Supreme Court U.S.
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No. 02-625

IN THE

Supreme Court of the United States

DISABLED RIGHTS ACTION COMMITTEE,

Petitioner,

v.

THE FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, The Fremont Street Experience Limited Liability Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This matter arises under the Americans With Disabilities Act of 1990 (the "ADA") in which the district court granted summary judgment in favor of Defendant The Fremont Street Experience Limited Liability Company (the "FSELLC") and against Plaintiffs Ronald Ray Smith, Carol Lee, and Robert Lee (collectively the "Individual Plaintiffs"), and the Disabled Rights Action Committee (the "DRAC").[1] Specifically, the district court action concerned certain facilities at the Fremont Street Experience in Las Vegas, Nevada.

The district court action became an example of how a well-intentioned and important federal law can be manipulated to tilt the careful balance struck between the rights of the disabled and the legitimate interests of American businesses. Specifically, in an effort to resolve the district court action, the FSELLC repeatedly accommodated the DRAC's unreasonable demands by making alterations to its facilities, even though the ADA did not require such alteration. As a result, the FSELLC went well beyond what was actually required by the ADA in accommodating the DRAC.

This Petition does ***not*** seek to remedy existing ADA violations. In fact, there are no longer any individuals involved in this matter, and the DRAC is the only remaining party pursuing this case. Rather, the DRAC devotes most of its Petition to arguing that it was entitled to a permanent injunction because the ADA violations alleged by the DRAC

1. The DRAC is the only remaining party pursuing in this matter. Individual plaintiffs Robert and Carol Lee did not participate in the Ninth Circuit appeal, and Mr. Smith has not joined in the DRAC's Petition for Writ of Certiorari.

are capable of repetition, and that the challenged conduct ***could*** recur at a later time. However, the district court never concluded that the FSELLC violated the ADA. In fact, in its order affirming summary judgment, the Ninth Circuit Court of Appeals remarked that the FSELLC "took seriously its obligations under the ADA and voluntarily remedied many of the conditions complained of, whether they were required to or not." The DRAC also fails to note that this litigation involved voluntary changes by the FSELLC to ***permanent physical structures***, as opposed to practices or policies. As a result, there is no basis for the DRAC to allege that the FSELLC will "resume" purported ADA violations once this litigation is concluded.

Accordingly, the FSELLC respectfully requests that this Court deny the Petition for Writ of Certiorari.

PROCEDURAL HISTORY

The DRAC and individual plaintiff Ronald Ray Smith commenced the lower court action on October 26, 1998, alleging two violations of the ADA. On November 2, 1999, the DRAC and Mr. Smith moved for leave to amend their Complaint, alleging additional violations of the ADA, and seeking to add Mr. and Ms. Lee as new parties to the litigation. Concurrently, the DRAC and the Individual Plaintiffs applied for a temporary restraining order and moved for a preliminary injunction concerning the new claims. On November 3, 1999, U.S. District Court Judge Howard McKibben denied the Application for Temporary Restraining Order, as the DRAC failed to file any affidavits in support of its Application. Subsequently, and after a hearing on December 22, 1999, Judge McKibben denied the Motion for Preliminary Injunction.

The district court action was ultimately reassigned to visiting Judge Justin L. Quackenbush. After participating in discovery, the FSELLC moved for summary judgment on April 13, 2001. The DRAC filed its written opposition on or about April 30, 2001, and within that same document made a counter-motion for summary judgment. After hearing oral argument on May 24, 2001, Judge Quackenbush granted the FSELLC's Motion for Summary Judgment, and denied Appellants' counter-motion. A formal memorandum opinion was entered on July 23, 2001, and judgment was entered in the FSELLC's favor on July 24, 2001. The Ninth Circuit Court of Appeals affirmed the district court order granting summary judgment in favor of the FSELLC, and *en banc* review was subsequently denied.

STATEMENT OF THE CASE

A. The Parties.

According to the Amended Complaint, Plaintiffs Ronald Ray Smith, Carol Lee, and Robert Lee are disabled persons, required to use a "wheelchair or mobilized scooter for mobility." The DRAC is a non-profit corporation with "over one thousand (1,000) members nationwide, most of whom are disabled." Mr. Smith, Ms. Lee, and Mr. Lee have not joined in the DRAC's Petition.

The FSELLC is a limited liability company that maintains and operates the Fremont Street Experience, a commercial and entertainment attraction in downtown Las Vegas, Nevada. The Fremont Street Experience consists of five blocks of what was formerly Fremont Street, which was closed to vehicular traffic and rebuilt as a commercial and entertainment complex. The Fremont Street Experience, which is adjacent to the many downtown casino resorts, offers

a variety of activities for its visitors, including shopping, entertainment, and special events. Adjacent to the Fremont Street Experience is a parking structure several stories tall, which is owned by the FSELLC's affiliated entity, the Fremont Street Experience Parking Corporation (the "FSEPC").

B. Allegations of ADA Violations.

On October 26, 1998, Mr. Smith and the DRAC commenced the district court action, alleging that the FSELLC constructed a Coca-Cola vending kiosk with a counter built too high off the ground. Mr. Smith and the DRAC also alleged that the FSELLC occasionally erected temporary stages that did not provide disabled access to members of the public.

Subsequently, on or about November 2, 1999, Mr. Smith and the DRAC moved to amend their Complaint.[2] The Amended Complaint added Robert Lee and Carol Lee as plaintiffs, and added Race Rock of Las Vegas, Inc., Race Rock of Las Vegas, L.L.C., Allright Sierra Parking, Inc., and Allright Corporation as defendants. The DRAC and the individual plaintiffs alleged *inter alia* that certain portions of a parking structure owned by the FSEPC, including a series of three toll booths at the building's exit, violated the ADA. The DRAC also claimed that the Race Rock Supercharged Restaurant (the "Race Rock"), an establishment still under construction at the time and ***not yet opened*** to the public, violated the ADA. The DRAC and the Individual Plaintiffs made this allegation without ever seeing the inside of the establishment, but rather by viewing Internet photographs of another Race Rock restaurant located in Orlando, Florida.

2. The motion to amend was granted by the district court.

At the same time, the DRAC applied for a temporary restraining order and moved for a preliminary injunction. Curiously, the DRAC did not seek alteration of allegedly inaccessible facilities. Rather, the DRAC sought the following broad relief:

> 1. to enjoin the FSELLC "from permitting any more public accommodations to open for business unless and until [the FSELLC] can demonstrate (by competent testimony given by a an [sic] ICBO-Certified Building Code Accessability/ Usability Specialist) that such new public accommodation meets the minimum accessability requirement of Title III" of the ADA; and
>
> 2. to enjoin the FSELLC "(and such other defendants as may be subsequently added to the complaint by amendment) from permitting the continued operation of public accommodations . . . unless and until [the FSELLC] can demonstrate (by competent testimony given by an ICBO-Certified Building Code Accessability/ Usability Specialist) that such new public accommodation meets the minimum accessability requirement of Title III" of the ADA.

Effectively, the DRAC sought ***to shut down*** the Fremont Street Experience, without ever having established that the FSELLC had committed an ADA violation, and without knowing whether new facilities would be constructed or what would be constructed. Additionally, because the district court had not yet granted the DRAC's motion for leave to file its proposed Amended Complaint (which named additional defendants to the action), the DRAC was demanding immediate injunctive relief against persons that were not even parties to the litigation.

District Court Judge McKibben denied the Application for Temporary Restraining Order for the DRAC's failure to attach supporting evidence, and thereafter instructed counsel to confer in an effort to resolve accessibility issues. At that time, the instant litigation became quite contentious. The period was marked by an incident in which Mr. Smith circumvented the discovery process by venturing into the FSELLC's executive offices, committing a criminal trespass and proceeding past the receptionist without permission, and photographing areas of the FSELLC's office that are not open to the public. In addition, Mr. Smith communicated directly with FSELLC employees about the case, in spite of the fact that litigation was already pending between the parties. When the FSELLC offered to mediate accessibility issues, the DRAC declined, stating that it wanted a "judgment" against the FSELLC.

Despite these differences, the FSELLC unilaterally and unconditionally agreed to do the following: (1) lower by four inches a urinal located in a private restroom of the FSELLC executive offices; (2) lower an after-hours security buzzer at the FSELLC offices; (3) instruct Third-Party Defendant Young Electric Sign Company ("Yesco") to modify a storage shed by replacing the door handle and including a ramp leading to the entrance; (4) move two parking spaces identifying the FSELLC's "Employee of the Month" and "Employee of the Year" to another location; and (5) instruct Race Rock to address certain accessibility issues raised by the DRAC. It should be noted that the alteration of Item 3 (modifying the storage shed) was not even required under the ADA, but was agreed to because the requested alteration was so inexpensive. The alteration identified in Item 4 was not even raised by the DRAC in its pleading, but was voluntarily offered by the FSELLC. In addition, because the

Individual Plaintiffs and the DRAC's members were neither employees of the FSELLC, Race Rock, or Allright Sierra Parking, they were not entitled to alteration of Items 1 and 2. Nevertheless, the FSELLC voluntarily altered its facilities in good faith.

Other accessibility issues remained. The most prominent involved a row of three parking attendant toll booths at the exit of the FSEPC parking garage. Judge McKibben denied the Motion for Preliminary Injunction in its entirety, ruling specifically that it was "unlikely that the plaintiff [was] going to prevail on the merits involving the attendant booths." The Ninth Circuit Court of Appeals subsequently affirmed Judge McKibben's Order, and the DRAC did not challenge the Ninth Circuit's order.

Thereafter, the DRAC voluntarily dismissed all of its claims against Race Rock of Las Vegas, Inc. and Race Rock of Las Vegas, LLC. In fact, Race Rock ceased operations on April 9, 2001. Further, the DRAC never served Defendants Allright Sierra Parking, Inc. and Allright Corporation with a summons and Amended Complaint and, as a result, they were dismissed by the district court. Despite these dismissals, the DRAC refused to dismiss its identical claims against the FSELLC.

C. The Coca-Cola Kiosk.

In or about December 1995, the FSELLC and Coca-Cola entered into an exclusive Sponsorship Agreement whereby Coca-Cola was granted the exclusive right to offer for sale Coca-Cola beverages in the Fremont Street Experience. Pursuant to the Sponsorship Agreement, Coca-Cola was granted the right to construct outdoor kiosks for dispensing and vending Coca-Cola beverages and products. During

1997, two outdoor kiosks were constructed in the Mall. Coca-Cola paid all construction costs for both outdoor kiosks. Coca-Cola was the owner of the larger of the kiosks (the "Large Kiosk"), and retained net proceeds from sales of Coca-Cola products and merchandise sold therein.[3]

In moving for summary judgment, the FSELLC offered evidence of an architect's drawing demonstrating that the Large Kiosk was designed and built with a countertop that, at one point, was no higher than 36 inches off the ground as required by the ADA. At the other end of the counter, the Large Kiosk was equipped with a "Roll Out Counter" which was 44 inches wide and built "a maximum of 3'-0" above finished grade." The FSELLC also submitted correspondence from the City of Las Vegas, demonstrating that the Large Kiosk was designed specifically to comply with the ADA. The Large Kiosk was demolished and removed from the Fremont Street Experience in or about May 1999, for reasons unrelated to this litigation.

D. Temporary Stages.

As part of the entertainment and special events at the Fremont Street Experience, the FSELLC occasionally erects temporary stages. These temporary stage areas, however, are closed to the public at all times. The FSELLC set this policy when it first commenced using such stages, and did so because of potential liability issues in the event that a person were to injure himself on a stage. Performers are expressly instructed by the FSELLC not to invite members of the public onto the stage during a performance. Since the commencement of the district court action, the FSELLC has

3. Accessibility to the second of the two Coca-Cola kiosks was not at issue in the district court action.

gone so far as to contractually prohibit its performers from allowing any person "other than [the] performer or his staff" onto the stage for any reason. None of the Individual Plaintiffs or members of the DRAC have ever performed or been employed by a performer at a FSELLC special event.

Additionally, the FSELLC purchased two wheelchair lifts in October 1999, one for each stage, at a cost of $6,552. These lifts make each stage accessible to members of the public as well as performers and stage hands. Nevertheless, the FSELLC still maintains a policy prohibiting members of the public from stage areas.

E. Parking Attendant Toll Booths.

The FSEPC parking garage contains a row of three parking attendant toll booths, through which automobiles exit upon leaving the garage. At one time, one of the three booths provided a ramp leading up it, and the other two did not. To the FSELLC's knowledge, none of the Individual Plaintiffs or members of the DRAC were employed by or ever sought employment from Allright Sierra Parking, Inc., the entity that managed the parking garage.

Despite the foregoing facts, the DRAC demanded that ***all*** of the attendant booths be made accessible to the disabled. Although the district court had previously concluded that the DRAC was ***not*** likely to succeed with the merits of its case, and although that order was affirmed by the Ninth Circuit Court of Appeals, the FSELLC voluntarily and unconditionally agreed to install ramps leading up to the two remaining toll booths. On March 13, 2001, the DRAC approved the FSELLC's plans to alter the booths. Those alterations were completed prior to the hearing on the parties' cross-motions for summary judgment.

F. The FSELLC's Motion for Summary Judgment.

On April 13, 2001, the FSELLC moved for summary judgment, noting that all of the DRAC's complaints had been resolved, either by mootness (e.g., destruction of the Coca-Cola kiosk and closing of the Race Rock) or by voluntary modification (e.g., storage shed and toll booth alteration). The FSELLC further pointed out that the DRAC's original allegations of ADA violations had been greatly exaggerated and overstated.

In response, the DRAC offered no contradictory facts. Rather, Mr. Smith ventured back to the Fremont Street Experience (after the close of discovery) and sought to raise new issues of noncompliance. Specifically, the DRAC submitted evidence in violation of the Federal Rules of Civil Procedure and the district court's previous discovery order. Further, the evidence was never included as part of the DRAC's trial exhibits (and thus could not have been introduced at trial), and did not even appear to demonstrate any ADA violation. Accordingly, Judge Quackenbush entered summary judgment in favor of the FSELLC.

REASONS FOR DENYING THE PETITION

A. Standard of Review.

Federal law provides, in pertinent part, as follows:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who

> owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). In the event of a violation of 42 U.S.C. § 12182, federal law provides for a limited remedy as set forth in 42 U.S.C. § 2000e-3(a). 42 U.S.C. § 12188(a). Section 2000e-3(a), part of the remedial provision of the Civil Rights Act of 1964, provides only for prospective injunctive relief, and not money damages. *Hoepfl v. Barlow*, 906 F. Supp. 317, 319 (E.D. Va. 1995).

B. The DRAC Is Not Entitled to Assert Nearly All of the Claims of ADA Violations.

As a threshold matter, it is important to note that the Individual Plaintiffs and the DRAC's members were not even entitled to assert most of the claims alleged in the Complaint and Amended Complaint. In particular, the Individual Plaintiffs and the DRAC's members were often not aggrieved parties, as there was no injury in fact caused by the FSELLC's alleged "discrimination." The allegations made were admittedly observations, and nothing more. Yet apparently many of these allegations were made under the notion that the ADA is a federally mandated building code that may be enforced by anyone at any time, without regard to Article III of the U.S. Constitution.

The FSELLC notes that the Individual Plaintiffs and the DRAC made the following "observations" of inaccessibility in the lower court action:

- **Yesco Shed** - Located within the FSEPC Parking Garage and operated by Yesco, the DRAC alleged that this restricted work area was inaccessible even though none of the Individual Plaintiffs or DRAC

members were employed by (or have ever applied for employment with) Yesco.

- **Parking Attendant Toll Booths** - Located within the FSEPC Parking Garage and operated by Allright Sierra, the Individual Plaintiffs and DRAC alleged that this restricted work area was inaccessible even though none are employed by (or have ever applied for employment with) Allright Sierra.

- **FSELLC Restroom** - Located within the FSELLC Executive Offices, the Individual Plaintiffs and DRAC alleged that this restroom was inaccessible even though none were employed by (or have ever applied for employment with) the FSELLC. Further, this condition (a urinal approximately four inches too high) was ***not*** discovered by Mr. Smith when trying to use the restroom. Rather, Mr. Smith noticed the condition only after slipping past the FSELLC receptionist in an attempt to gather evidence outside of the discovery process.

- **FSELLC Executive Offices** - The Individual Plaintiffs and the DRAC alleged that an "after hours" doorbell located at the FSELLC Executive Offices was too high. However, there was no indication that the Individual Plaintiffs or any of the DRAC's members ever visited after hours (when the FSELLC office door was locked), thus requiring its use. Moreover, none ever indicated that they intended to visit the FSELLC offices in the future.

- **Parking Spaces and Signage** - The Individual Plaintiffs and the DRAC alleged that the number of accessible parking spots was insufficient and that

handicapped spaces contained improper signage. However, none ever alleged that he or she even attempted to park a car in the garage.

- **Temporary Stages** - The Individual Plaintiffs and the DRAC alleged that they were entitled to have access to temporary stages, even though none had ever been employed by a performer at a FSELLC special event and, as members of the public, were not entitled to stage access.

- **Coca-Cola Kiosk** - The Individual Plaintiffs and the DRAC alleged at the time of filing their Complaint that they merely intended to visit the kiosk "from time to time" in the future.

- **Race Rock Restaurant** - The Individual Plaintiffs and the DRAC made allegations of inaccessibility before the restaurant even opened. In its Opposition to Plaintiffs' Motion for Temporary Restraining Order, the FSELLC noted that the Individual Plaintiffs and the DRAC had not even seen the inside of the restaurant. Only after the FSELLC pointed out this defect did Mr. Smith visit Race Rock, making "observations" solely for the purpose of litigation and solely in an attempt to manufacture standing where none existed.

The record is also devoid of allegations or evidence that any member of the DRAC is or has been employed by the FSELLC, Yesco, Race Rock, or Allright Sierra Parking, or that any member has ever sought such employment.

The Ninth Circuit Court of Appeals has held that a plaintiff cannot maintain an ADA action challenging the

lawfulness of an employee work area where that plaintiff is not an employee that would be subject to the alleged discrimination. *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 924 (9th Cir. 2001). In *Long*, which also involved the DRAC and Mr. Smith, the Ninth Circuit stated:

> The ADA's citizen suit provision allows civil actions for injunctive relief to be brought "by the person aggrieved. . . ." 42 U.S.C. § 2000a-3(a). Neither of the individual plaintiffs, Long and Smith, works at the Orleans and plaintiffs have not alleged how they are in any way aggrieved by a violation occurring in an area accessible only to employees. Also, while the Supreme Court has long recognized that an association may have standing as the representative of its members . . . the Disabled Rights Action Committee has not alleged that any of its members are employees of the Orleans or would have occasion to enter the working areas of the slot change kiosks. Accordingly, these plaintiffs ***do not have standing*** to challenge any non-compliance in the employee area of the slot change kiosks.

Id. (citations omitted) (emphasis added).[4] On the same basis, Judge Quackenbush concluded that the DRAC had not suffered an "injury in fact." Whether the argument is characterized in terms of standing or injury in fact, the result is the same—the Individual Plaintiffs and the DRAC had no basis to allege ADA violations in employee work areas because they and their members were not employees of the FSELLC, Race Rock, or Allright Sierra, and thus had no entitlement to access those challenged areas.

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4. It appears that the DRAC did not petition this Court for a writ of certiorari after the Ninth Circuit decision in *Long*.

Curiously, although *Long* is directly on point, the DRAC completely fails to cite it in its Petition. It is not as though the DRAC was not aware of this case—the DRAC was a party in *Long*, and Mr. Armknecht was its attorney of record. Regardless of the DRAC's intentions in failing to cite to this case, *Long* is dispositive of nearly every alleged ADA violation in this matter, as almost all of the allegations in the lower court action involve employee work areas, and neither the Individual Plaintiffs nor the DRAC's members were employees of the FSELLC, Race Rock, or Allright Sierra Parking.

C. Many of the DRAC's Claims of ADA Violations Are Moot.

The DRAC also ignores the fact that many of its allegations of ADA violations were moot by the time the district court heard oral argument on the parties' cross-motions for summary judgment. Specifically, the Large Kiosk was dismantled in May 1999 for reasons unrelated to the litigation. Race Rock removed its exterior "retail trailer," which had also been the subject of the DRAC's claims, in November 1999 when the restaurant opened. The restaurant itself ceased operations on April 9, 2001.

At the time it moved for summary judgment, the FSELLC had addressed all outstanding accessibility issues to the DRAC's satisfaction. In fact, in the few instances where the FSELLC made alterations, such alterations were not required by the ADA, but were undertaken because alteration was far less expensive than litigation.

The resolution of these issues was demonstrated by a "Statement of Claims as Basis for Equitable Relief," filed in the district court by the DRAC on November 15, 2000,

pursuant to the district court's order. In the Statement, the DRAC identified only three outstanding accessibility issues:

1. Access to temporary performing stages;

2. Access to parking attendant booths; and

3. Access to "mobile retail sales facilities . . . entering the property from time to time."

However, the FSELLC had purchased wheelchair lifts for each of its temporary stages in October 1999. Further, although not even required by the ADA, the FSELLC constructed ramps leading to all three parking attendant toll booths.

The FSELLC was never quite able to understand what the DRAC meant when it alleged that "mobile retail sales facilities" were inaccessible. Said allegation was not part of the Complaint or the Amended Complaint. Further, the DRAC had not offered any evidence of "mobile retail sale facilities" in violation of the ADA prior to the filing of the FSELLC's Motion for Summary Judgment. Significantly, the DRAC's list of trial exhibits, which was served on April 16, 2001, made no reference to such facilities.

As a result, all outstanding accessibility issues were resolved at the time the district court entered summary judgment. There was no need for a trial, and no need for any order requiring the alteration of facilities. Because the ADA only allows for prospective injunctive relief, summary judgment was appropriate as to the DRAC's ADA claim. *See Hoepfl*, 906 F. Supp. at 319 (ADA provides only for preventive injunctive relief, and not money damages).

D. The DRAC Failed to Comply with Rule 56 in Opposing the FSELLC's Motion for Summary Judgment and in Filing Its Cross-Motion for Summary Judgment.

The DRAC also fails to note that it largely abandoned the requirements of Fed. R. Civ. P. 56 in opposing the FSELLC's Motion for Summary Judgment, and in filing its Cross-motion for Summary Judgment. Significantly, the DRAC did not dispute a single fact asserted by the FSELLC in its Motion for Summary Judgment. Neither Robert Lee nor Carol Lee submitted an affidavit in opposition to the FSELLC's Motion for Summary Judgment. In fact, they were not even listed as trial witnesses.

Instead, the DRAC relied heavily on affidavits that were ***not*** submitted with the DRAC's brief, but had been filed with the court approximately 18 months earlier. Of course, a district court has no obligation search through the court file "for evidence that establishes a genuine issue of fact when the nonmovant presents inadequate opposition to a motion for summary judgment." *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136-37 (9th Cir. 2001). Nevertheless, the district court did just that at oral argument, and was still unable to find any genuine issues of material fact after reviewing these affidavits.

E. The DRAC Sought and Still Seeks a Sweeping Injunction Against the FSELLC That Would Be Improper.

At oral argument on the parties' cross-motions for summary judgment, it became apparent that the DRAC wanted much more than a district court order altering facilities. Rather, the DRAC was seeking some kind of sweeping order that would "cause [the FSELLC] to take

seriously its responsibilities under the ADA" and obtain a "change in the way that FSELLC does business with regard to ADA accessibility." This overreaching was similar to the DRAC's previous request for preliminary injunctive relief, in which it demanded that the district court shut down the ***entire*** Fremont Street Experience.

The DRAC ignores the record before it. The FSELLC went on the record to state that it did—and still does—take seriously its obligations under the ADA. Specifically, the FSELLC demonstrated that it regularly consults with counsel and with the Department of Justice on questions of ADA compliance. Further, during the course of the district court litigation, the FSELLC went to great expense to purchase mobile lifts for its temporary stage facilities and to make other accommodations to the DRAC, often where accommodations were not required under the law. The FSELLC even retained an engineer ***recommended by the DRAC*** to design ramps leading to the parking attendant toll booths.

In short, the DRAC has mistakenly and repeatedly alleged that the FSELLC has engaged in ADA violations, all in the hope that repetition—without evidence—would ultimately prevail. When the FSELLC attempted to resolve outstanding issues on an informal basis, the DRAC continued to unfairly and inaccurately smear the FSELLC as a bad corporate citizen with a "tradition" of ADA violations. Needless to say, the DRAC's unreasonableness was not contemplated by our nation's leaders when the ADA was enacted in 1990. *See* Statement by President George Bush Upon Signing S. 933, P.L. 101-336, 1990 U.S.C.C.A.N. 601 (July 26, 1990) (discussing the "careful balance struck between the rights of individuals with disabilities and the legitimate interests of business" in enacting the ADA).

Further, the DRAC's request—that the district court compel the FSELLC to "change" the way it does business—was astonishing. The DRAC had and still has absolutely no idea how the FSELLC conducts its business. It took no depositions in this matter, and took almost no discovery in this case. Despite the fact that it uncovered ***no evidence*** of inadequate oversight, the DRAC kept claiming that the FSELLC needed to change its ways.

In this light, the DRAC's citation to *Adarand Constr., Inc. v. Slater*, 528 U.S. 216 (2000), and cases like it, are inapplicable because they involve the voluntary cessation of unlawful ***practices and policies***. Lest the DRAC forgets, this case involves challenges to ***structures and facilities***, the alteration of which is not so easily accomplished. Does the DRAC truly believe that the FSELLC will "re-alter" facilities that were voluntarily changed (i.e., raising a bathroom urinal by four inches) once this Petition is determined? Frankly, the FSELLC has better things to do with its time.

Even to the end, the DRAC was never quite certain of what it wanted from the district court. It suggested that the district court compel the FSELLC to "hire someone" to monitor ADA compliance. It also suggested that the court order a "thorough" ADA Title III review of structures. Both suggestions, however, were merely that—suggestions. The DRAC offered no legal authority directing that such broad remedies are even permissible under the ADA. With regard to the DRAC's latter suggestion, it was undisputed that the district court litigation alone accomplished a tireless review by the FSELLC of all its permanent structures. Regardless, the DRAC still seems to be searching for ways to draw out this litigation, for no other

reason than to keep harassing the FSELLC and recover attorney's fees.[5]

The DRAC has ignored the appropriate legal standard in this matter. In a civil action alleging an ADA violation, preventive injunctive relief is the sole available remedy. *Hoepfl*, 906 F. Supp. at 319. To obtain preventive injunctive relief under the ADA, a plaintiff must demonstrate that there is a likelihood of suffering discrimination in the future. *Id.* at 323. The Ninth Circuit follows this rule, holding that an ADA plaintiff "can ***at most*** hope to improve access through an injunction." *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1120 (9th Cir. 2000) (emphasis added).

A case that is particularly instructive is *Midgett v. Tri-County Metropolitan Transp. Dist.*, 74 F. Supp.2d 1008 (D. Ore. 1999). In *Midgett*, a disabled bus passenger sued the metropolitan transportation district under the ADA, arguing that the agency failed to provide adequate lifts on its buses. After making certain accommodations, the agency moved for summary judgment, arguing that the plaintiff had proved, at most, isolated ADA violations, but had failed to prove "a system-wide failure to provide accessible transportation. . . ." *Id.* at 1011. The district court agreed, granting summary judgment. In particular, the court noted that "ongoing occasional lift problems" on the buses did not violate the ADA, and that, under the circumstances, an injunction would be improper. The court added:

> Additionally, plaintiff has not met his burden of demonstrating a threat of ***irreparable*** future harm.

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5. Because there was no judicially sanctioned change in the parties' relationship in the lower court, the DRAC could not have obtained an award of attorney's fees as a prevailing party. *See Buckhannon Bd. and Care Home, Inc. v. West Va. Dep't of Health and Human Resources*, 532 U.S. 598 (2001).

> Although plaintiff has raised an inference that he might, in the future, again experience delay in getting to his destination, the record plainly demonstrates every time plaintiff has chosen to use Tri-Met, he ultimately has been transported to his destination. In view of that undisputed fact, and balancing that fact against the public's interest generally and Tri-Met's interests specifically, I find that injunctive relief in this case is unwarranted.

74 F. Supp. 2d at 1018 (emphasis in original).

In the district court action, the DRAC utterly failed to demonstrate that its members were denied services or accommodations. The Individual Plaintiffs made only observations for the purpose of creating litigation issues. Further, the DRAC completely failed to demonstrate a threat of irreparable future harm, and this is essential proof required to establish an entitlement to injunctive relief. Like the plaintiff in *Midgett*, the DRAC in this case failed to meet its burden of proof. Accordingly, the district court properly concluded as follows:

> [T]he court sees no justification . . . to substitute its judgment for that of FSELLC as to how to comply with the ADA or for this court to oversee FSELLC's efforts to so comply. There is nothing in the record to be the basis for this court becoming a monitor for FSELLC compliance with the ADA. FSELLC has voluntarily remedied every ADA violation alleged by the Plaintiffs, whether or not it was actually a violation. I therefore must conclude that the Plaintiffs are not entitled to injunctive relief under the federal ADA.

The Ninth Circuit, which looked at the entire record, including Mr. Smith's Affidavit, agreed, concluding that the FSELLC "took seriously its obligations under the ADA and voluntarily remedied many of the conditions complained of, whether they were required to or not." Therefore, summary judgment was properly granted.

F. Mr. Smith's Affidavit Was An Abuse of the Discovery Process.

In its Petition, the DRAC charges that the district court improperly excluded Mr. Smith's Affidavit when granting summary judgment in favor of the FSELLC. As a threshold matter, this argument is little more than an attempt to "correct" the lower courts in their resolution of this litigation. This is not a proper reason for seeking certiorari. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (achieving justice in a particular case "is ordinarily not sufficient reason" for granting certiorari). The DRAC's argument raises no constitutional issue. Nor does it involve a "split" among the circuits. Nor does the DRAC's Petition seek the interpretation of a federal statute or rule.

More importantly, the DRAC is simply wrong when it argues that the district court refused to consider Mr. Smith's Affidavit or its attachments. To the contrary, Judge Quackenbush's order granting summary judgment specifically notes that it considered the affidavit for the purposes of determining whether a permanent injunction was appropriate. The court stated:

> Plaintiffs now try to assert new claims by way of an affidavit of Plaintiff Smith filed on May 1, 2001, stating newly observed problems at the Fremont Street Experience. The affidavit raises

> completely new issues. The court is satisfied that it is not going to order prospective injunctive relief based on these newly raised issues. ***Even as to these newly observed problems, there has been no showing of injury in fact.***

Petition at p. 18a (emphasis added). Based on this language, the district court did in fact consider the Affidavit, despite its reservations about its admissibility, and ***still*** concluded that the DRAC could not avoid summary judgment.

The DRAC's attempt to characterize the decision to exclude Mr. Smith's Affidavit as conflicting with Supreme Court precedent presses the bounds of credibility, especially when viewed against the actual district court record. Months before the FSELLC even moved for summary judgment, the district court required the DRAC to file a "Statement of Claims" setting forth in detail its allegations of ADA noncompliance. The so-called "Statement of Claims" was required as a result of an exchange between the parties at a status conference on November 2, 2000. At that hearing, the DRAC misrepresented that alleged structural violations had not been resolved. Counsel for the FSELLC, in exasperated fashion, responded as follows:

> Your Honor, I'd like to voice my absolute befuddlement. Mr. Armknecht and I sat down last December and we resolved a number of issues based on the plaintiffs' allegations of noncompliance, and those issues were resolved. The ones that weren't resolved were adjudicated by Judge McKibben in the motion for preliminary injunction. . . . [A]fter that hearing and after changes were made, I wrote to Mr. Armknecht saying these changes have been made, if there are

> any problems, please let me know. And that was ten months ago, and I haven't heard from him since. I'm just – I'm just amazed that he would get up here and say that the Fremont Street Experience is cutting corners. . . . I want it on the record . . . if there are any compliance issues that need to be taken care of right now, so that – so that they can be taken care of, I would like to know what those are. Otherwise, I think we can move to summary judgment.

At that time, the district court suggested that "a more definite statement" would resolve the confusion about compliance issues, and the DRAC did ***not*** object. In fact, counsel for DRAC stated that he "underst[ood]" the need for such a statement. The DRAC subsequently filed a Statement of Claims, which the FSELLC relied upon in preparing its defense of the case.

Mr. Smith's Affidavit did not dispute any of the facts set forth by the FSELLC in its Motion for Summary Judgment. Rather, the Affidavit raised brand new allegations of noncompliance ***for the first time*** in the litigation. This was a last-minute tactic to avoid summary judgment, after realizing that all outstanding accessibility issues had been resolved.

Fed. R. Civ. P. 56(e) requires that evidence be admissible when submitted in support of or against a motion for summary judgment. In this case, the DRAC's eleventh-hour evidence was never disclosed during the discovery period, and the photographs attached to that affidavit were ***not even taken*** until after the FSELLC filed its Motion for Summary Judgment.

In the district court's Scheduling Order of November 7, 2000, Judge Quackenbush stated, in pertinent part, as follows:

> Rule 26 shall apply in its entirety to this case. This court views Rule 26 as an open file policy. Counsel shall hold an in-person Rule 26 Disclosure Conference on no later than December 8, 2000. Counsel shall voluntarily disclose anything counsel or their clients know having any relevance to this case, including the bad with the good, except for privileged information.

The submission of the DRAC's last-minute evidence presented a number of problems for the district court. First, the DRAC's photographs, as well as Mr. Smith's Affidavit, took the DRAC's allegations well beyond the Complaint, the Amended Complaint, and even the Statement of Claims that was expressly required by the district court. Second, the DRAC sought to introduce documentary evidence that was not even identified on its Trial Exhibit List. This presented a problem similar to that of the DRAC's failure to include Mr. and Ms. Lee on its witness list. Simply put, how could the DRAC expect to have its last-minute evidence admitted on summary judgment when it could not even offer these exhibits into evidence at trial?

Third, and worst of all, the DRAC again violated the rules of discovery (and the district court's order) by creating and producing evidence well after the discovery cut-off. The sanctions for a party's failure to make mandatory disclosures is well-settled—such a party is precluded from introducing into evidence the information that was not disclosed. Fed. R. Civ. P. 37(c)(1). It is no excuse that the photographs in question were not taken until after the discovery cut-off. Under Rule 26, the parties have an

obligation to disclose all documents "that the disclosing party may use to support its claims or defenses. . . ." Fed. R. Civ. P. 26(a)(1)(B). Rule 26(e) also requires the parties to supplement their disclosures when appropriate. Such violations, unless harmless, result in automatic sanctions which ***must*** be imposed by the district court. Hon. William W. Schwarzer, et al., *Federal Civil Procedure Before Trial* § 11:189 (1999), *citing* Committee Notes on Amendments to Federal Rules of Civil Procedure (1993), 146 F.R.D. 401, 691.

The FSELLC further notes that the district court litigation had been poisoned previously by the DRAC's litigation tactics. In 1999, the DRAC circumvented the rules of discovery by venturing without permission into the FSELLC Executive Offices and taking photographs of private employee work areas. Throughout the litigation, the DRAC took chameleon-like positions, ultimately forcing the district court to request a more specific statement of its claims. In 2001, the DRAC was still taking photographs, after discovery was closed, after its trial exhibit list had been filed, after receiving a dispositive motion, and hoping that it could pass off the photographs as admissible evidence.

Whether the DRAC's repeated failure to follow the rules of discovery and procedure was malicious or occurred in spite of its best intentions is beside the point. The DRAC's conduct made the district court litigation, at many points, all but impossible to defend. It goes without saying that the rules of discovery are designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958).

The DRAC cannot suggest that the FSELLC was not prejudiced by its actions. Among other things, the FSELLC voluntarily made alterations that were not even required under the ADA, solely so that it could narrow the issues and achieve a final resolution of this case. The FSELLC spent substantial time, money, and effort to prepare and file its Motion for Summary Judgment. In response, the DRAC offered undisclosed allegations and new issues never previously identified.[6] Because of the timing of the DRAC's disclosures, the FSELLC ***was completely precluded*** from conducting discovery to determine the veracity and accuracy of the last-minute claims. Further, the DRAC's last-minute allegations would have required the reopening of discovery and the adding of parties. Had Judge Quackenbush allowed this, the DRAC would have been rewarded for its improper conduct.

While Judge Quackenbush ruled that the DRAC's eleventh-hour allegations of additional ADA violations did not give rise to injunctive relief, he did suggest that the DRAC could convert its last-minute allegations into a new and separate lawsuit against the FSELLC. Interestingly, and although more than one year has passed since that hearing, the DRAC has not filed a separate action against the FSELLC concerning the allegations made in Mr. Smith's Affidavit.

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6. It is improper for the DRAC to now justify Mr. Smith's Affidavit by claiming that "the best evidence of a defendant's conduct will always be the most recent evidence." Petition, p. 13. Using this logic, discovery in ADA cases would never end, as a plaintiff could raise new issues, even during trial, for the first time. Moreover, in opposing the FSELLC's objections to Mr. Smith's Affidavit, the DRAC did ***not*** argue that the conditions complained of did not exist until after the discovery cut-off, thereby precluding it from raising those issues during the discovery period.

Finally, it should be noted that the last-minute evidence submitted by the DRAC was not even probative of any ADA violation. In its reply brief on its Motion for Summary Judgment, the FSELLC engaged in a substantial discussion about why the DRAC's proffered evidence did not demonstrate any ADA violation. At oral argument, counsel for the FSELLC also addressed the insufficiency of DRAC's evidence. In both cases, the DRAC ***did not dispute*** the FSELLC's arguments. Therefore, the DRAC's last-minute evidence was not only procedurally improper, it did not even demonstrate the existence of an ADA violation.

CONCLUSION

Judge Quackenbush's order granting summary judgment in favor of the FSELLC was properly affirmed. Based on the Ninth Circuit's decision in *Long* (which the DRAC does not challenge), the DRAC does not have standing to assert nearly all of the ADA claims in this case. Further, the DRAC's remaining claims are moot, either through changed circumstances or by reason of the FSELLC's willingness to make accommodations, even where alteration was not required. There is simply no basis for indefinite prospective court oversight of the FSELLC, which would be the only possible result of granting certiorari. Accordingly, the FSELLC respectfully requests that this Court deny the DRAC's Petition in all respects.

Respectfully submitted,

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